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No. 07-972

Supreme Court, U.S.
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In The
Supreme Court of the United States

BOARD OF COMMISSIONERS OF
DICKINSON COUNTY, KANSAS, ET AL.,

Petitioners,

v.

ABILENE RETAIL #30, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does a party contesting, on First Amendment grounds, the validity of an adult use ordinance, create an issue of material fact, precluding summary judgment, on the question of whether the evidence ostensibly relied upon in support of the ordinance at issue is reasonably believed to be relevant to the amelioration of adverse secondary effects in the subject jurisdiction, by demonstrating that the materials relied upon do not support, and in some cases militate against, the adoption of the particular regulations at issue?

2. Does such a party cast direct doubt upon the legislative rationale ostensibly supporting such an ordinance, sufficient to create a question of material fact and preclude summary judgment as to the legitimacy of that rationale, by:

   a. Introducing expert testimony demonstrating that the evidence ostensibly relied upon by the county in legislating was shoddy, and did not support its legislative rationale, and;

   b. Introducing expert testimony tending to affirmatively disprove a connection between the operation of adult uses and such adverse secondary effects, and;

   c. Introducing local evidence showing the absence of any connection between the sole adult use in the subject jurisdiction and such adverse secondary effects?

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED – Continued

3. Does such a party create a material question of fact for trial, precluding summary judgment, as to whether the predominant concern of an adult use ordinance is with the content of adult speech, rather than its secondary effects, when:

   a. The immediate predecessor of the subject ordinance recited reliance on a legislative record that was neither assembled nor reviewed prior to its enactment;

   b. A last-minute amendment to the subject ordinance ensured that the only adult use in the jurisdiction would be compelled to close in its present location;

   c. The ordinance was adopted despite the awareness on the part of the legislature that no adverse secondary effects were caused by the only adult use in the county;

   d. The ordinance would force the closure of the only adult use in the county despite its being located in the sort of location that most such ordinances, and the studies relied upon by the county, suggest as best suited to ameliorate the alleged adverse secondary effects of adult speech?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Abilene Retail #30, Inc., hereby advises the Court that:

(1) It has no parent corporation, and;

(2) No publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

In September 2003, Respondent opened an adult bookstore in Dickinson County, Kansas. Located adjacent to an off ramp on Interstate 70, the bookstore was the first adult business to locate in that county in at least a quarter century, and perhaps the first ever. Pet. App. at 3a.

For ten months, that store operated subject to no more regulation than any other business in the county, before, on July 8, 2004, the county adopted an ordinance (No. 070804, "the first ordinance") restricting the location and operation of adult businesses. Pet. App. at 4a.[1]

The Respondent filed suit in district court on July 16, 2004, seeking declaratory, and preliminary and permanent injunctive relief against the enforcement of the ordinance on First, Fourth and Fourteenth Amendment grounds. Pet. App. 5a.

The parties agreed to the entry of a preliminary injunction, staying the enforcement of the first ordinance, pending the resolution of this case. Concerned that the first ordinance might not survive constitutional scrutiny, the county thereafter began to consider draft versions of a revised adult use ordinance, which was the subject of a public hearing on December 6, 2004. Pet. App. at 5a.

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[1] The content of, and the ostensible basis for that legislation are addressed later in this Brief.

That night, the county commissioners heard testimony that the location requirements set forth in the draft ordinance before them would not force the Respondent to close its store in Dickinson County. Pet. App. at 5a.

On December 13, 2004, the county adopted a revised adult use ordinance (No. 121304A, "the second ordinance"), the enforcement of which would force the Respondent to close its store, in its present location, after a period of amortization. Pet. App. at 5a-6a.

On February 11, 2005, the Respondent filed an amended complaint, contesting the second ordinance on substantially the same bases as the first, after which, the parties agreed to continue the existing preliminary injunction, allowing it to remain in force as the litigation progressed. Pet. App. at 8a.

On March 28, 2005, the Petitioners filed a motion for summary judgment, contending, inter alia, that the ordinance was a content neutral restriction intended to address the perceived secondary effects of adult expression, was narrowly tailored to do so, and left open adequate alternative avenues of communication, in accord with the requirements of the First Amendment. Pet. App. at 62a.

Discovery commenced, and over a four-month period, the Respondent deposed various employees of Dickinson County, a commissioner designated as the Civil Rule 30(b)(6) deponent for the county, and a member of the public actively involved in advocating for the closure of its store.

Both sides also engaged experts, who provided reports and were deposed regarding the claimed connection between adult uses and adverse secondary effects, and regarding whether the county reasonably relied upon the materials ostensibly in its legislative record in enacting the ordinance at issue. Pet. App. at 8a. "Ostensibly" is apt because Petitioners enacted the first ordinance without ever having consulted the documents to which its preamble referred, despite express preambulatory claims to the contrary. Pet. App. at 5a.[2]

On December 1, 2005, the district court entered summary judgment for the Petitioners on all counts.

On appeal, a Tenth Circuit panel held that the district court had erred. Both the panel majority, Pet. App. at 14a-15a, and a concurrence, Pet. App. at 30a, first concluded that the predominant legislative purpose behind the second ordinance was content-neutral,

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[2] Respondent also established that last minute changes to the second ordinance, that would force the Respondent to close its bookstore in its present location, were made between the December 6, 2004 public meeting and the December 13, 2004 adoption of the ordinance, only after a member of the public pointed out that an earlier draft would not force that result. Pet. App. 5a-6a. Respondent demonstrated below, through the testimony of the county's own witnesses, none of the adverse secondary effects supposedly attributable to adult uses manifested themselves in Dickinson County in the more than twenty months that elapsed between the opening of the bookstore and the close of discovery – during which neither the first nor second ordinance was enforced. Pet. App. at 42a and n.6. Respondent will discuss the significance of these facts later in this Brief.

an issue Respondent contested in the district court and on appeal, and that therefore strict scrutiny did not apply.

Applying intermediate scrutiny, however, the panel majority held that it was error to conclude, as a matter of law, that the legislative record ostensibly relied upon by the county reasonably supported the restrictions set forth in the second ordinance, and that material questions of fact precluded summary judgment for the Petitioners on that point. Pet. App. at 16a-25a.

In a concurrence – which the panel majority joined as an alternative basis for its holding, Pet. App. at 3a – Circuit Judge Ebel also found that summary judgment was improper, albeit for a different reason, concluding that while the county had met its initial burden, Respondent had succeeded in casting doubt upon its legislative rationale.

He found that it had done so both through the introduction of expert and other evidence tending to undermine the Petitioners' secondary effects theory, Pet. App. at 41a-43a, and by demonstrating flaws in the studies contained in the legislative record itself, thereby creating a material question of fact regarding the shoddiness of the legislative record. Pet. App. at 44a-46a.

On October 25, 2007, the Tenth Circuit denied a petition for rehearing en banc filed by the Petitioners. Pet. App. at 49a. The petition now at bar followed.

REASONS FOR DENYING THE WRIT

In this case the Tenth Circuit reached an altogether correct result through the thoughtful application of existing precedent. In finding that the extensive record below precluded summary judgment regarding the constitutionality of the second ordinance, both the majority and the concurrence carefully followed the analytical template set forth by the plurality in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).[3]

[3] In a concurring opinion, Justice Kennedy opined that the constitutionality of adult use restrictions also depends on their mitigating the adverse secondary effects attributed to adult speech, without diminishing the availability of that speech in the subject jurisdiction. *Alameda Books*, 535 U.S. at 449-50 (Kennedy, J., concurring in the judgment). Five circuits have recognized that the concurrence of Justice Kennedy, read together with the plurality opinion, constitutes the holding of the Court, under the rule articulated in *Marks v. United States*, 430 U.S. 188, 193 (1977). *See: N.W. Enterprises v. City of Houston*, 532 F.3d 162, 182 and n.18 (5th Cir. 2003); *Joelner v. Village of Washington Park*, 378 F.3d 613, 624 and n.7 (7th Cir. 2004); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856, 862 and n.1 (8th Cir. 2003); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310 and n.19 (11th Cir. 2003). The requirements of the plurality thus constitute the absolute

(Continued on following page)

Neither opinion invalidated the ordinance on First Amendment grounds. Rather, for different reasons, and at different points in their structured *Alameda Books* analysis, both the panel majority and Judge Ebel correctly found that material questions of fact existed on the record, which precluded the entry of summary judgment for the Petitioners on the First Amendment merits of the case.

I. The Panel Majority Correctly Held That Whether the Adult Use Restrictions Adopted In the Second Ordinance Were Reasonably Adopted, In Light of the Legislative Record Advanced Below, Presented a Material Fact Question, Precluding Summary Judgment.

The panel majority carefully examined the legislative record advanced in support of the second ordinance, and concluded that record could not be held to provide a reasonable basis for the restrictions imposed by that ordinance, conclusively, and as a matter of law, thereby precluding summary judgment on that question for the Petitioners. Pet. App. at 25a.

The three-part analytical framework applicable to adult use ordinances contested on First Amendment grounds was articulated in *Alameda Books*, in the plurality opinion which, read together with the concurrence of Justice Kennedy, carefully delineates

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minimum the Petitioners must demonstrate if the second ordinance is to survive First Amendment review.

what the parties to a case such as this must prove, and when, in order to prevail.

After concluding that an adult use ordinance is, in fact, aimed at the secondary effects, and not the content of adult speech, a court must next ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 535 U.S. at 441 (plurality).[4]

That inquiry, while marked by a certain degree of deference to legislative judgment, is to be a real inquiry nonetheless, and not merely a pro forma ratification of whatever legislative rationale may be offered in support of a given ordinance.

> Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." On the other hand, we must acknowledge that the Los Angeles City Council is in a better

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[4] The conclusion that such an ordinance is aimed at the secondary effects, and not the content, of adult expression is a threshold requirement that must be met before intermediate scrutiny, in the form of the three part test described in Sections I and II of this Brief, can be applied. Whether the Tenth Circuit properly found that summary judgment could be entered for the Petitioners on the question of a content-neutral legislative purpose is an issue addressed in Section III of this Brief.

> position than the Judiciary to gather and evaluate data on local problems.

Alameda Books, 535 U.S. at 440 (plurality) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality) and citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)).

The exercise of such independent judgment presupposes a critical inquiry on the part of a reviewing court, that tests the connection between the stated rationale for an ordinance and the restrictions contained therein, a connection that must bear up under examination.

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, 535 U.S. at 438-39 (plurality).

The panel majority made precisely such an inquiry below, before concluding – on the extensive record assembled in this case – that the Petitioners had not established a reasonable relationship between the legislative record they had assembled, and the ordinance they had adopted, conclusively, and as a matter of law, so as to require summary judgment in their favor. Pet. App. at 23a.

Petitioners contend that the majority exceeded its limited mandate, substituting its own judgment for that of the county commissioners who adopted the second ordinance. Pet. at 7-8.

The contention is insupportable on the record below.

The panel majority acknowledged that its role was limited, and that it could not reweigh, de novo, the facts upon which the Petitioners relied in adopting their ordinance. Pet. App. at 16a. It also expressly recognized that the Petitioners could look to the experience of other jurisdictions in considering the ordinance at issue. Pet. App. at 17a-18a.

But what the panel majority found that the Petitioners could **not** do was simply invoke secondary effects cases and studies that not only failed to support the restrictions contained in the second ordinance, but actually militated against them.

The panel majority noted that last minute changes to drafts of that ordinance were plainly intended to force the closure of the only adult book

store in the county, notwithstanding the fact that the store was located near an interstate highway exit, and far from any residential neighborhood, church, school or other sensitive use. Pet. App. at 19a-20a.[5]

The Petitioners did so **not** on the strength of a legislative record that supported such a regulation, but **despite** evidence in their own legislative record showing that such a location is precisely the sort of place in which an adult business should be required to locate to mitigate the claimed adverse secondary effects of adult speech. Pet. App. at 18a-20a and Notes 7-9.

In short, the panel majority took seriously its obligation to "examine evidence concerning regulated speech and secondary effects," *Alameda Books*, 535 U.S. at 440 (plurality), by carefully reviewing the legislative record advanced by the Petitioners, and assessing the content of that record in light of the restrictions it was advanced to support.

It took equally seriously the longstanding requirement, first articulated in *City of Renton v. Playtime*

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[5] The panel majority noted that initial drafts of the second ordinance would have required adult uses to be only 750 feet from the nearest residence, while the second ordinance, as adopted, contained the odd requirement that there be at least 1,200 feet between an adult use and the nearest residence, a fact which it interpreted as plain evidence of an intent, on the part of Dickinson County, to capture the sole adult bookstore in the jurisdiction, which is located over 1,000 feet, but less than 1,200 feet from a building used as a residence. Pet. App. at 24a.

Theatres, 475 U.S. 41 (1986), that while a municipality may regulate secondary effects based upon the experience of other cities, that experience must be germane to its own circumstances:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, **so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.**

Renton, 475 U.S. at 51-52 (emphasis added).

Petitioners contend that the panel majority has inappropriately created a heightened standard for rural jurisdictions, by holding that they may not rely solely upon urban secondary effects studies when regulating adult uses. Pet. at 8-10.

However, the panel majority did not fault the Petitioners for their reliance on urban studies per se, but rather for their off-the-shelf use of (a) some urban studies that were inapposite to the circumstances faced by Dickinson County, and (b) others which counseled against the regulations ostensibly adopted by the county to address those circumstances.

To permit such reliance, the panel majority found, would be to approve, carte blanche, any justification a municipality might proffer in support of an adult use regulation.

> Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business, of any type, located in any setting.

Pet. App. at 19a-20a.

The problem was not that Petitioners relied entirely upon urban studies to justify the second ordinance, but that they did so without any attempt to connect those studies to the circumstances at issue in Dickinson County.

> Nowhere in the record or in the Board's brief is an effort made to analogize the studies it relied upon to the current or anticipated secondary effects of sexually oriented businesses in a rural county.

Pet. App. at 23a.

Petitioners contend that the panel majority has opened a split with the Fifth Circuit, which in *L.L.E.H. v. Wichita County, Texas*, 289 F.3d 358 (5th Cir. 2002) expressly permitted a rural county to adopt an adult use regulation solely upon the strength of urban secondary effects studies.

Any disagreement between the Fifth and the Tenth Circuits raised by this case is not of the sort that merits the attention of this Court. This is so for three reasons.

First, the panel majority declined to follow *Wichita County* not because it disagreed with the use of urban studies in that case, but because it objected to the Fifth Circuit permitting urban studies to be relied upon in anticipation of future growth, a rationale which it found did not serve a "current governmental interest," as required by *Barnes v. Glenn Theatres*, 501 U.S. 560 (1991). Pet. App. at 20 and Note 10.

Second, *Wichita County* was decided only three weeks after *Alameda Books*, the analysis of which it does not incorporate.

Third, the Fifth Circuit has not, since *Alameda Books* was decided, relied upon *Wichita County* in assessing an adult use ordinance at the first stage of the *Alameda Books* analysis.[6]

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[6] As noted by Circuit Judge Lucero, the Fifth Circuit in *Fantasy Ranch, Inc. v. City of Upper Arlington*, 459 F.3d 546, 559-62 (5th Cir. 2006) relied on *Wichita County* to assess the narrow tailoring of an adult use ordinance, an analysis which it opined had not been altered by *Alameda Books*, while recognizing that its analysis regarding the legislative rationale of that ordinance was governed by *Alameda Books*. Pet. App. at 55a. This hardly heralds a split in the circuits.

II. The Concurrence Correctly Found That Evidence in the Record Cast Sufficient Doubt Upon the Legislative Rationale Advanced by the Petitioners in Support of the Second Ordinance to Preclude Summary Judgment at the Second and Third Steps of the *Alameda Books* Analysis.

In a concurring opinion, which the panel majority joined as an alternative basis for its holding, Circuit Judge Ebel found that the Petitioners had met their initial burden, under *Alameda Books*, to demonstrate a reasonable connection between the second ordinance and its legislative record, but that the Respondent had succeeded in introducing enough evidence to cast doubt upon that rationale, thereby precluding summary judgment. Pet. App. at 40a-47a.

That conclusion, like the conclusion of the panel majority, was entirely correct, and consistent with *Alameda Books*.

A plaintiff may cast doubt upon the legislative rationale advanced in support of an adult use ordinance, " . . . either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings . . . " Either method shifts the burden of proof "back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 438 (plurality). The Respondent hewed carefully to this methodology below.

To demonstrate that the evidence in the legislative record did not support the ostensible rationale for the second ordinance, the Respondent introduced a substantial body of expert testimony, which carefully analyzed the studies upon which Dickinson County claimed to have relied in adopting that ordinance. Pet. App. at 44a-45a.

That evidence contained exhaustive critiques of the evidence relied upon by the county, demonstrating the ways in which that evidence was shoddy and did not support the legislative rationale of the county. Pet. App. at 45a.

To dispute the factual premises which undergird the legislative rationale of the county – that there is a connection between the operation of adult uses and the existence of adverse secondary effects – the Respondent did even more.

The Respondent demonstrated that its adult bookstore was responsible for none of the adverse secondary effects the county had ostensibly legislated in an effort to address.

Between September 2003 and July 2005, neither the first nor the second adult use ordinance was enforced. The bookstore operated by the Respondent thus operated for twenty months without being subject to any adult use regulation.

That notwithstanding, two witnesses associated with the Petitioners testified that, during that period, Dickinson County experienced none of the adverse

secondary effects which those ordinances were ostensibly adopted to ameliorate.[7]

Judge Ebel correctly concluded that this evidence **alone** was sufficient to cast doubt upon the legislative rationale of the county, precluding summary judgment. Pet. App. at 42a-43a.

Second, the Respondent introduced additional evidence, including expert testimony and five analytical studies which demonstrate the absence of a connection between adult uses and the existence of adverse secondary effects. Pet. App. at 42a.

The evidence presented by the Respondent below, which ran to many hundreds of pages, was of precisely the sort which this Court in *Alameda Books* held may be used to cast doubt upon the legislative rationale for an adult use ordinance.

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[7] As noted above, the county did not pass the first ordinance until July 2004. Neither that law, nor the second ordinance, adopted in December of that year, were enforced while this case was pending in the trial court. In the summer of 2005, Respondent deposed the Dickinson County Undersheriff, and the County Commissioner who was designated as the Civil Rule 30(b)(6) deponent for the county. Both testified that the county had experienced no increase in such adverse secondary effects as crime, sexually transmitted disease, or other public health problems, the prevention of which were ostensibly the basis for adopting the ordinance, since the adult bookstore opened, some twenty months earlier, despite the county having agreed not to enforce its adult use ordinances. Pet. App. at 42a and Note 6.

That fact notwithstanding, the district court held that the Respondent had failed to cast any doubt upon the legislative rationale of the county, because much of the evidence described above was offered in the report and declaration of Daniel Linz, a professor at the University of California.

Dr. Linz presented both the critiques of the evidence in the legislative record, and the five studies, described above, tending to negate the existence of adverse secondary effects. The district court ignored the latter evidence, and concluded, as a matter of law, that the former was immaterial, having been rejected in other cases. Pet. App. at 68a-69a.

The Petitioners now echo that approach, asserting that the materials presented by Dr. Linz are insufficient, as a matter of law, to cast doubt upon their legislative rationale, and that to hold otherwise is to credit the opinion of an expert witness above that of the county commissioners. Pet. at 16-17.

These contentions are unavailing for several reasons. Foremost among these is that the district court erred grievously in finding the testimony of Dr. Linz to be inadequate to the task for which it was presented, both because it rejected his methodology (of which more below) and because it found his position to have been adequately rebutted by Dr. Richard McCleary, one of the expert witnesses retained by the Petitioners. Pet. App. at 69a.

Judge Ebel found that this rebuttal evidence did not merit summary judgment for the Petitioners, but

rather only created an even more closely contested question of fact, to be resolved after a trial, regarding the legislative rationale advanced by the Petitioners. Pet. App. at 46a-47a.

Judge Ebel properly noted that questions regarding the comparative merit and credibility of witnesses are not to be resolved on summary judgment, but at trial. Pet. App. at 47a. That has long been the position of this Court:

> [I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> * * *
>
> [C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

In this case, the trial court was faced with competing experts, and chose to credit the testimony of one over the other as a matter of law. What is more, it

did so to the detriment of the party resisting summary judgment, and despite the fact that the expert testimony offered by the Petitioners did nothing to negate the evidence that the county had suffered no adverse secondary effects after its sole adult use opened for business. Pet. App. at 23a-24a. This was in plain derogation of the well-established rule to the contrary. The concurrence correctly identified this as erroneous. Pet. App. at 46a-47a.

Petitioners complain that if an expert can cast doubt upon a legislative rationale "with nothing more than . . . scattering of academic criticisms" juries will be permitted to second guess the wisdom of legislative judgments, and local governments will be compelled to "read and absorb scholarly materials" before legislating. Pet. at 17. This is histrionic.

The criticisms leveled against the legislative record in this case were not punctilious niceties.

Rather, they demonstrated, to the satisfaction of all three members of the Tenth Circuit panel, that there exist open questions regarding whether the materials ostensibly relied upon by the county actually support the propositions for which they were cited. Pet. App. at 45a.

The Petitioners contend that "something more" is necessary to cast direct doubt upon their legislative record. Significantly, they never say what more. And for good reason.

A point-by-point critique of the materials in the legislative record is a direct and obvious way of "demonstrating that the municipality's evidence does not support its rationale" *Alameda Books*, 535 U.S. at 438 (plurality). Indeed, it undertakes to do precisely what the plurality in *Alameda Books* requires a plaintiff to do at this stage in a case contesting an adult use ordinance.

In that light, the suggestion, repeated by the Petitioners at every stage of the case, that this Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2002), dismissed the work of Dr. Linz as unreliable is of little moment.

It is a canard that should none-the-less be put to rest, and for that purpose, we address it briefly here.

It was Justice Souter who, concurring in *City of Erie*, pointed favorably to a study which Dr. Linz had submitted in that case in support of a brief filed by amicus curiae. He relied upon the study in passing, to support his observation that the ostensible link between adult uses and secondary effects is, by nature, subject to empirical verification, and that despite this, is seldom supported by anything like empirical evidence. *City of Erie*, 529 U.S. at 315 and n.3 (Souter, J., concurring in part and dissenting in part).

Writing for the plurality, Justice O'Connor responded to his observation, and "rejected the idea" that "we should ignore [a local government's own]

actual experience and require an empirical analysis" simply because such an analysis was possible. *Id.* at 302 (plurality).

But the unwillingness of this Court to accept a study, which was submitted for the first time in an amicus brief filed here, over the first hand experience of legislators whose experience was an uncontested part of the trial court record, hardly amounts to the outright rejection of Dr. Linz, his methods, or his conclusions that the Petitioners suggest.

That is all the more true here, where the studies and analysis submitted by Dr, Linz confirmed, and did not conflict with, local evidence demonstrating a lack of secondary effects in connection with our bookstore.

III. The Judgment Below, Reversing Summary Judgment for the Petitioners, Was Correct on the Alternative Ground, Rejected by Both the District Court and the Court of Appeals, that There Was Sufficient Evidence In the Record to Create a Question of Material Fact Regarding the Predominant Legislative Purpose for Which the Ordinance at Bar was Adopted.

Respondent urged, in the Court of Appeals, that summary judgment should be reversed on the additional ground that the record presented genuine questions of material fact as to whether or not the adoption of the second ordinance was predominantly

motivated by a concern with the supposed adverse secondary effects of adult speech, or was motivated by an animus toward its content, making summary judgment for the Petitioners improper on that question.

The panel majority, Pet. App. at 15a, and the concurrence, Pet. App. at 30a, rejected that position, finding that the second ordinance was content-neutral, as a matter of law, and proceeded to review that ordinance under intermediate scrutiny.

This Court has long allowed a respondent opposing certiorari to champion, as an alternative basis for the holding in the court of appeals, any basis for the judgment of that court which is supported by the record, and would not expand the relief granted to the respondent in the mandate. *Thigpen v. Roberts*, 468 U.S. 27 (1984), *United States v. New York Tel. Co.*, 434 U.S. 159, 166 (1977), *Langnes v. Green*, 282 U.S. 531, 536-37 (1931).

The Tenth Circuit correctly held that it was improper to grant summary judgment for the Petitioners in the district court. The fact that evidence in the record created a question of material fact regarding the predominant legislative purpose behind the ordinance at bar provides an additional basis for that holding.

While it is not a basis that the Tenth Circuit adopted, it is one that would support the judgment of that court.

The Tenth Circuit acknowledged the substantial evidence which demonstrated that the second ordinance was not actually adopted to address adverse secondary effects.

That evidence included the fact that the first and second ordinance were adopted notwithstanding the fact that the county experienced no adverse secondary effects after the adult bookstore at issue in this case opened. Pet. App. at 42a.

It included the fact that the second ordinance was adopted in a form plainly intended to force that store to close, as a result of amendments made after the Petitioners learned that earlier drafts would not achieve that result. Pet. App. at 24a.

And it included the fact that the store is located off an interstate highway, near an exit ramp, the sort of place where commercial businesses are usually found. It is nowhere near a church, a school, a day-care center or a park, and is more than 1,000 feet from the nearest residence. It is located precisely where most ordinances of this kind permit adult bookstores. Pet. App. at 18a.

Alameda Books "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech].'" *Alameda Books*, 535 U.S. at 440-41 (plurality) (quoting *City of Renton*, 475 U.S. at 47-54 (emphasis deleted by the *Alameda Books* plurality).

The Ninth Circuit – in a case sustaining an adult use ordinance against a First Amendment challenge – provided a sound approach to this inquiry. A court charged with ascertaining the predominant legislative concern behind an adult use ordinance should avail itself of all the evidence in the record. We repeat its guidance here:

> We look to the full record to determine whether the purpose of the statute is to curb secondary effects. In doing so, we will "rely on all objective indicators of intent, including the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings."

Dream Palace v. County of Maricopa, 384 F.3d 990, 1013-14 (9th Cir. 2003) (quoting *Alameda Books*, 535 U.S. at 434 (plurality), and citing *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1165 (9th Cir. 2003); *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (citations within citations omitted)).

The record in this case contained evidence sufficient to permit a trier of fact to conclude that the second ordinance was not adopted for a predominantly content-neutral purpose.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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